thereunder that are relevant to the stated issues; (iv) set forth a concise statement of the facts material to the consideration of the stated issues; and (v) present a concise argument setting forth the reasons why review by the Commission is necessary or appropriate to resolve an important issue of law or public policy.

(3) Any party opposing the application may serve and file a response within fifteen (15) days after service of the application.

(4) An application shall not exceed 30 pages and a response shall not exceed 25 pages, without leave expressly granted by the Presiding Officer.

(5) After the time for the filing of a response has expired the Commission will determine whether to grant a review, based upon the application for review and the response thereto, without oral argument or further written presentation, unless the Commission shall otherwise direct.

(b) *Notice of review.* If the Commission should determine to review an initial decision, the Hearing Clerk shall serve a copy of its order granting review upon each of the parties.

(c) *Scope of review.* Unless the Commission shall otherwise direct, only the issues presented for review as set forth in the application, and all subsidiary issues subsumed therein, will be considered by the Commission.

(d) *Briefs and Appendix to Briefs.* In the event the Commission should determine to review the initial decision, the parties shall file briefs and designate the contents of the appendix in accordance with the procedures set forth in § 10.102 of the Commission's rules of practice: *Provided,* That in reparation proceedings the brief of the party who sought review (or if no party sought review, the brief of the complainant) shall be filed within thirty (30) days after service upon the parties of the Commission's order granting review of the initial decision.

(e) *Oral argument.* Any party may request, in writing and within the time provided for filing the initial briefs, the opportunity to present oral argument before the Commission, which the Commission may in its discretion grant or deny. In the event the Commission affords the parties the opportunity to present oral argument before the Commission, the oral argument shall be in accordance with the provisions of § 10.103 of this chapter.

§ 12.102 The record of proceeding.

If the Commission grants an application for review of an initial decision or the Commission decides on its own initiative to review an initial decision, the record of the proceedings shall be made available to the Commission. The record of the proceeding shall include: The pleadings, motions and requests filed, and rulings thereon; the transcript of the testimony taken at the hearing, together with the exhibits filed therein; any statements or stipulations filed under the summary procedures; any documents or papers filed in connection with prehearing conferences, such proposed findings of fact, conclusions, and orders and briefs as may have been permitted to be filed in connection with the hearing; such statements of objections, and briefs in support thereof, as may have been filed in the proceedings; and the initial decision.

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No. 80-203

In the Supreme Court of the United States

OCTOBER TERM, 1980

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,
PETITIONER,
VS.
J.J. CURRAN AND JACQUELYN L. CURRAN,
RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF OF RESPONDENTS J.J. CURRAN AND JACQUELYN L. CURRAN

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INTRODUCTION

Respondents are not in disagreement with those portions of petitioner's brief relating to Opinions Below; Jurisdiction and Statutes Involved. Respondents point out, however, that the cause of action in this case accrued prior to May, 1974 and that certain provisions of the Commodity Exchange Act ("CEA"), 7 U.S.C., §§1, *et. seq.*, specifically the customer reparation provisions set forth in CEA §14, are not available to the respondents in the instant case. In the absence of an implied private right of action under the CEA, the respondents will be left without any relief from the petitioner's conduct which is violative of the CEA.

CONCISE STATEMENT OF THE CASE

The petitioner's brief provides an accurate Statement of the Case, except for that portion of the discussion which deals with the specific question presented herein; namely, whether a private cause of action exists under the CEA. For purposes of clarity, a history of the litigation is presented below, but only insofar as it affects the question presented before this Court.

Respondents commenced the instant lawsuit in April, 1976, by filing a complaint for monetary damages in the United States District Court for the Eastern District of Michigan. Count IV of respondents' complaint alleged violations of §§ 5 and 12(2) of the Securities Act of 1933, 15 U.S.C. §§77e, 77 1(2). (JA 17).[1] Count V of the Complaint alleged, *inter alia*, that untrue statements of material facts were made in connection with the offer and sale of securities and commodity futures and that such misrepresentations constituted a fraud and deceit upon respondents. A cause of action was based upon, among others, the Securities Exchange Act of 1934, particularly §15(c)(1) and Rule 10b-5, 15 U.S.C. §78 o (c)(1) and 17 C.F.R. §240.10 b-5, §17 (a) of the Securities Act of 1933, 15

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[1] "JA____" page references are to the Joint Appendix previously submitted to this Court under separate cover.

U.S.C. §77 q (a), and CEA §4, 7 U.S.C. §6. (JA 18). Count VI similarly alleged a device, scheme and artifice to defraud respondents, and a cause of action was likewise alleged under the Securities Act of 1933, the Securities Exchange Act of 1934 and the CEA. (JA 18-19).

On May 24, 1976, petitioner moved to dismiss respondents' complaint. Alternatively, petitioner requested a partial dismissal and a stay of proceedings pending arbitration. Paragraph 2 of petitioner's motion requested that "the Court dismiss, pursuant to Rule 12(b)(6) Fed. R. Civ. P., those allegations of the Complaint purporting to state claims under the Securities Act of 1933 and the Securities Exchange Act of 1934, to wit: Counts IV, V and VI of the Complaint." (JA 24). Significantly, at no time did the petitioner request a dismissal of the respondents' claims under the CEA. On February 23, 1977, the Hon. Thomas P. Thornton ordered "that Counts IV, V and VI of Plaintiff's [Respondents'] Complaint be and the same are hereby dismissed." The District Court then stayed any further judicial proceedings (presumably Counts I, II, III, VII and VIII) pending arbitration of the dispute.

Respondents subsequently sought clarification of the District Court order, specifically, whether Counts IV, V and VI, including claims based upon the CEA, had been dismissed in their entirety. Petitioner opposed any clarification of the District Court order, adopting a position entirely inconsistent with its position before this Court. Specifically, petitioner argued that respondents' complaint alleged violations of the CEA, a claim sufficient to "create federal jurisdiction independent of the Securities Act" (p. 7 of Defendant's [Petitioner's] Memorandum of Law) and to create a sufficient jurisdictional basis for enforcing an arbitration provision. (This arbitration provision was held unenforceable by the Court of Appeals for the Sixth Circuit and this point is not now before this Court). On April 18, 1977, the District Court denied respondents' request for a clarification of its order of dismissal.

Respondents appealed the decision of the District Court, asserting as an issue that their claims under the CEA should not have been dismissed. Contrary to petitioner's statement that this issue was

considered by the Sixth Circuit Court of Appeals "[w]ithout benefit of briefing or argument by the parties" (PB 3),[2] respondents affirmatively urged that a private right of action existed for violations of the CEA. Pages 28-29 of Respondents' brief (RC A-4-5)[3] before the Sixth Circuit Court of Appeals addresses this precise issue:

> The Commodity Exchange Act, 7 U.S.C. Section 1 et seq. (herein the "CEA") prohibits fraudulent acts in connection with the purchase or sale of regulated commodity futures. It is well established that a private cause of action exists for violations of the CEA. *Deaktor v. L. Schreiber & Co.*, 479 F.2d 529 (7th Cir. 1973); *Goodman v. H. Hentz & Co.*, 265 F.Supp. 440 (N.D. Ill. 1967); *Johnson v. Arthur Espey, Shearson, Hammill & Co.*, 341 F.Supp. 764 (S.D.N.Y. 1972). Based on that settled right of action, plaintiffs in Counts V and VI of their complaint charged defendant with engaging in conduct which not only violated provisions of the federal securities laws, but were also violative of provisions of the CEA.
>
> * * *
>
> Plaintiffs are unable to fathom the basis upon which its CEA claims were thus stricken, particularly since defendant did not even request such relief and there is not a shred of authority upon which that dismissal can rest. Nor can plaintiffs understand the refusal by Judge Thornton to amend his order to conform to the pleadings and to the law. Such dismissal of CEA claims and refusal to amend the Court's order are clearly erroneous. They should be reversed by this Court.

On appeal, the Sixth Circuit Court of Appeals construed the District Court's dismissal of Counts IV, V and VI as having granted

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[2] "PB____" page references are to the Brief of the Petitioner filed in the instant case.

[3] "RC____" page references are to the Brief in Opposition to a Writ of Certiorari filed by the respondents in this case. The reference in the text is to the Appendix filed as part of that Petition.

only the relief requested by the petitioner's motion to dismiss. (PC A-23 n. 16).[4] Respondents' claims under the CEA were considered to have survived Judge Thornton's order of dismissal. The Sixth Circuit Court of Appeals then raised *sua sponte* the issue whether implied rights of action under the CEA had survived the extensive 1974 amendments. As the Court of Appeals noted, "an implied right of action was generally thought to exist prior to the 1974 amendment of the Act (CEA)" (PC A-24). After a careful review of the legislative history of the 1974 amendments to the CEA, and after application of the four-pronged test enunciated in *Cort v. Ash*, 422 U.S. 66 (1975), the majority concluded that a private right of action existed for violations of §4b of the CEA. Although this point had never been contested by petitioner at any time during the litigation, a petition for certiorari was filed with this Court to determine whether a private right of action should continue to be implied under the CEA.

SUMMARY OF ARGUMENT

The question presented is whether the CEA implicitly provides a private right of action for a trader of commodity futures contracts against his broker in federal court to recover damages for violations of §4b of the CEA. Although this private right of action is not explicitly conferred by the CEA, it is not necessarily inconsistent with Congressional intent to imply a private right of action. *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 16-17 (1979) ("*TAMA*"); *Cannon v. University of Chicago*, 441 U.S. 677, 694 (1979). Prior to the adoption of the extensive amendments to the CEA called the Commodity Futures Trading Commission Act of 1974 ("CFTCA"), an unbroken string of federal district court decisions, beginning with *Goodman v. H. Hentz & Co.*, 265 F.Supp. 440 (N.D. Ill. 1967), had interpreted §4b of the CEA as creating a private right of action for aggrieved traders. Thus, the issue to be considered by this Court is whether Congress intended to repudiate

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[4] "PC____" page references are to the Petition for a Writ of Certiorari filed by the petitioner in this case. The reference in the text is to the Appendix filed as part of that Petition.

this unanimous interpretation of that section when it adopted the CFTCA.

In *Cort v. Ash, supra*, this Court outlined a preferred approach for determining whether a private right of action should be implied from a federal statute. *California v. Sierra Club*, ____ U.S. ____, 101 S.Ct. 1775, 1778 (1981). The four factors outlined in *Cort* provide criteria through which the ultimate issue of whether Congress intended to create a private remedy can be discerned. *Davis v. Passman*, 442 U.S. 228, 241 (1979). An application of the *Cort* factors in the instant case demonstrates that Congress necessarily intended that a private cause of action would exist under §4b of the CEA.

First, it is obvious that the Currans — as traders in the commodity futures market — fall precisely within that class of individuals which the CEA was amended to protect. The legislative history of the CFTCA evinces an expressed intention to provide traders, and particularly, customers, with full protection under the statute. The very language of §4b of the CEA indicates that commodity futures traders are the precise class of persons for whose *especial* benefit that section was adopted. As accurately observed by Judge Mansfield in his dissent in *Leist v. Simplot*, 638 F.2d 283 (2d Cir. 1980), § 4b can be relied upon only by *customers* who have been defrauded by their own brokers. *Id.* at 331-33. Since the statute itself makes clear that only persons with a direct relationship with a futures broker may complain of a violation of §4b, this first *Cort* test is easily satisfied with respect to the respondents.

Turning to the second and most important of the *Cort* factors, see *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575-76 (1979); *TAMA, supra*, at 15-16; *Northwest Airlines, Inc. v. Transport Workers Union*, ____ U.S. ____, 101 S.Ct. 1571, 1580 (1981); *Universities Research Association, Inc. v. Coutu*, ____ U.S. ____, 101 S.Ct. 1451, 1461 (1981), the ultimate question of Congressional intent must be addressed. Congressional intent not to disturb the private right of action which had been unanimously recognized by the federal courts is amply demonstrated by facts, not conjecture. First, as Congress undertook the formidable revisions of the CEA in 1974, it did so with a clear awareness that the federal courts had in-

terpreted §4b as creating a private right of action. Significantly, most of these cases involved the very types of activities involved in the case *sub judice*, i.e., fraudulent misrepresentations and churning of a customer's account by his broker.[5] The legislative history is replete with references to the existence of judicially implied remedies to redress violations of the CEA. In addition to references by congressmen to the existence of a private right of action, testimony from witnesses, including exchange and industry representatives who explained that customers could take their claims to court, was received. It is highly significant that not a single legislator expressed any opposition to the interpretation of §4b as providing traders with a private right of action against their brokers. Plainly, Congress could have rejected the implication of a private remedy into §4b and definitively precluded private lawsuits as part of the CFTCA, but this it declined to do. *Leist v. Simplot, supra*, at 303. It would have been quite surprising had Congress acted to restrict a pre-existing legal remedy, since the primary thrust of the CFTCA was to *extend* the protection available to commodity futures traders for violations of the CEA. *See* 120 CONG. REC. 9402 (1974) (remarks of Rep. Smith, summarizing the report prepared by the Committee of Agriculture); 120 CONG. REC. 10748 (1974) (remarks of Rep. Throne); *Hearings on S.2485, S.2578, S.2837 and* H.R. 13113 Before the Committee on Agriculture and Forestry, 93d Cong., 2d Sess. 258 (1974) (hereinafter "*1974 Hearings*") (the legislation designed to "close loopholes in federal commodity futures regulation", remarks by Rep. Rodino). Sound principles of statutory construction indicate that when Congress reenacted §4b in the identical language of its predecessor, it thereby adopted the interpretation of that statute placed upon it by the federal courts.

The evidence is overwhelming that Congress assumed and intended that a private cause of action would continue to exist after adoption of the CFTCA. Indeed, the very structure of the CEA, as amended in 1974, is incomplete unless a federal right of action is implied in favor of defrauded investors. For example, the CFTCA established a requirement that exchanges establish a "voluntary" procedure for arbitration of disputes for amounts less than $15,000.

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[5] *Leist v. Simplot*, 638 F.2d 283, 324 (2d Cir. 1980). (Mansfield, J., dissenting)

CEA §5a(11). By requiring the arbitration route to be "voluntary", the statute necessarily presumes an alternate forum for customer-broker disputes. Similarly, by limiting a customer's right to elect arbitration to disputes involving less than $15,000, the statute necessarily presumes the existence of a satisfactory alternative remedy for customers with claims in greater amounts. No such alternative remedy is explicitly provided for the Currans in the instant action, and the statutory framework is simply incomplete on its face without the implication of a private right of action under §4b of the CEA. Reparations, which Congress made available for claims arising on or after January 23, 1975, was not intended to be an exclusive remedy since complete relief is unavailable. For example, no administrative or judicial review is provided for an initial determination by the CFTC that no further action is justified. Similarly, Congress' action in delaying the effective date of the reparations remedy until January 23, 1975, which had the effect of creating three categories of complainants (one category of complainants who, like the Currans, are barred from utilizing reparations) cannot be justified on any rational basis other than that reparations was only intended to *supplement* a right of action in the courts. The legislative history of the CFTCA and the evidence of Congressional intent which can be derived from the statute's very structure, when viewed in the light of the "contemporary legal context," *Cannon, supra*, at 698-99, demonstrates that Congress intended that implied rights of action would exist under the CEA.

Our review of the third factor enunciated in *Cort*, i.e., whether the implication of a private right of action is consistent with the Congressional purpose behind the CFTCA, likewise compels the result that a private right of action exists in favor of futures traders against their own commodities brokers. The case *sub judice* is particularly compelling in that regard. Despite petitioner's repeated emphasis on the theoretical availability of reparations as a satisfactory remedy for the respondents, it cannot fairly be disputed that neither "voluntary" arbitration *nor* reparations are available to the Currans in the instant action. Reparations are available only to causes of action accruing on or after January 23, 1975. CEA §14(i); CFTC Reg. §12.21; *Hornblower & Weeks — Hemphill Noyes, Inc.*

v. Csaky, 427 F.Supp. 814, 817 n.4 (D.C.N.Y. 1977). Since the Currans' accounts were liquidated in April, 1974, the reparations procedure to which petitioner repeatedly points is simply inapposite. Unless a private right of action under the CEA is implied in favor of traders who have been defrauded by their own brokers, the Currans will be left without a federal remedy to redress the petitioner's violations of the federal statute. This would be a most paradoxical result in view of the fact that the CEA was revised for the precise purpose of increasing the protection available to commodity futures traders. COMPTROLLER GENERAL OF THE UNITED STATES REPORT TO THE CONGRESS: INTERIM REPORT ON THE COMMODITY EXCHANGE AUTHORITY AND ON COMMODITY FUTURES TRADING, *reprinted in* 120 CONG. REC. 13944 (1974) (hereinafter "INTERIM REPORT"); Reynolds, *Private Rights of Action for Commodity Futures Investors*, 55 B.U. L. REV. 804, 805-07 (1975) (hereinafter "Reynolds"). The Commodity Futures Trading Commission ("CFTC") has described itself as "an agency with limited resources which are insufficient to permit it to police all commodity-related transactions".[6] The backlog of reparations cases before the CFTC and the fact that common law or state law commodity claims can still be brought before the federal courts through diversity jurisdiction indicate Congress' intention that providing protection to investors would best be served by implication of a private remedy. In the words of this Court in *Cannon, supra*, an implication of a private remedy in favor of the Currans "is necessary or at least helpful to the accomplishment of the statutory purpose."[7]

Finally, the fourth factor enunciated in *Cort, i.e.*, whether the cause of action is one traditionally relegated to state law, so that implication of a private remedy would be inappropriate, can be quickly answered in the negative. The exclusive jurisdiction granted to the Commodity Futures Trading Commission and the CEA (and regulations promulgated thereunder) was intended to pre-empt any attempt by the states to regulate trading of commodity futures. As

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[6] The quoted language is from page 34 of an *amicus brief* filed by the Commission before the Second Circuit Court of Appeals in the case of *Leist v. Simplot*, *supra*, at 321.

[7] *Cannon v. University of Chicago*, 441 U.S. 677, 703 (1979).

stated by the JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE ON H.R. 13113, 120 CONG. REC. 33042 (1974): "In view of the broad grant of authority to the Commission to regulate the futures trading industry, the Conferees do not contemplate that there will be a need for any supplementary regulation by the States." The active involvement of the federal government in futures trading since 1922 and the pre-emption of state regulation of this area clearly indicates that implication of a federal remedy is not inappropriate.

Under the standards for implication of private remedies set forth in *Cort* and in the subsequent decisions of this Court, the unique circumstances present in the case *sub judice* are sufficiently compelling to warrant the implication of a private cause of action in favor of the Currans. The complete overhaul of the CEA in 1974 was undertaken with the knowledge of Congress that a private right of action had been consistently recognized for violations of CEA §4b.[8] Despite the explicit civil and criminal penalties which may be imposed against a futures commission merchant, such as petitioner, the Currans will find themselves faced with "a complete failure of alternative enforcement mechanisms," *Cannon, supra,* at 739 (Powell, J., dissenting). To prevent petitioner's statutory duty towards its customers from becoming merely precatory, some means for enforcing this duty is necessary. The implication of a private right of ac-

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[8] The situation in the instant case is thus analogous to the judicial history of the various provisions of the Railway Labor Act of 1926 which were held enforceable in federal court. As explained in Justice Powell's dissenting opinion in *Cannon, supra,* at 733-34, Congressional amendments to that statutory scheme were perceived as indicative of implicit approval of this Court's implication of a federal remedy for violations of that statute, which in turn supported implication of additional federal remedies under that Act. A federal remedy had been implied for violations of the CEA since 1967, and Congress indicated approval of these judicial decisions when it amended the CEA in 1974. The fact that this implication had manifested itself only in decisions of lower federal courts is not a controlling distinction where, as here, the federal courts had spoken with a unanimous voice. Consider, for example, this Court's acceptance of the 25-year-old implication of a private right of action for violations of Rule 10b-5 in *Superintendent of Insurance of New York v. Bankers Life & Casualty Co.*, 404 U.S. 6 (1971).

tion in favor of the Currans is necessary for the preservation of their rights under the federal statute.

ARGUMENT

APPLICATION OF THE *CORT v. ASH* ANALYSIS COMPELS THE CONCLUSION THAT THERE IS A CONTINUED PRIVATE RIGHT OF ACTION UNDER SECTION 4b OF THE CEA.

In *Cort v. Ash, supra*, this Court listed four factors from which it could be determined whether a private right of action should be inferred from a federal statute not explicitly providing such a remedy.[9] These factors, while fairly simple to enunciate, have proven considerably more difficult to apply in any particular context.[10] The ultimate inquiry, of course, is whether Congress intended to create a private right of action.[11] Even though imprecise, each aspect of the *Cort* analysis is significant in that it provides an objective criterion through which the Congressional intent can be ascertained.[12] Although "the so-called *Cort* factors are merely guides in the central task of ascertaining legislative intent, . . . they are not of equal weight, . . . and . . . courts need not mechanically trudge through all four of the factors when the dispositive question of

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[9] "First, is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted,' . . . that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?" 422 U.S. at 78 (citations omitted).

[10] *See, e.g., Cannon, supra*, at 741-42 (Powell, J., dissenting).

[11] *See California v. Sierra Club, supra*, at 1779; *Universities Research Ass'n v. Coutu*, ___ U.S. ___, 101 S.Ct. 1451, 1461 (1981); *TAMA, supra*, at 23-24; *Touche Ross & Co. v. Redington, supra*, at 568, 575-76.

[12] *California v. Sierra Club, supra*, at 1785 (Stevens, J., concurring).

legislative intent has been resolved",[13] an analysis of each of the four *Cort* factors is necessary where, as here, each factor points overwhelmingly to the necessity for the continued implication of a private right of action under §4b of the CEA.

I.

SECTION 4b OF THE CEA WAS ENACTED FOR THE ESPECIAL BENEFIT OF COMMODITY FUTURES TRADERS.

It is virtually self-evident from the statute that traders on the commodity futures markets, such as the Currans in the instant case, fit precisely within the class of persons for whose especial benefit §4b of the CEA was enacted. The legislative history of the CFTCA is replete with references to the need to protect the unsophisticated trader in commodity futures. *1974 Hearings* at 225 (remarks of Tom Maher); H.R. REP. NO. 975, 93d Cong., 2d Sess. 36-39 (1974); 120 CONG. REC. 9402 (1974) (remarks of Rep. Smith); 120 CONG. REC. 10748 (1974) (remarks of Rep. Throne); 119 CONG. REC. 5642 (1973) (remarks of Sen. Clark). The Sixth Circuit Court of Appeals in the instant case found that this first *Cort* element was "easily satisfied" and that investors in the commodities markets were "clearly" within the class for whose especial benefit the statute was enacted. (PC A-30). In *Rivers v. Rosenthal & Co.*, 634 F.2d 774 (5th Cir. 1980), a case which involved a private suit under CEA §4b by commodity futures customers against their brokers, the defendants chose not to dispute the applicability of the first *Cort* factor. *Id.* at 782, n. 13. Even §206 of the Investment Advisers Act of 1940, 15 U.S.C. §80b-6, a statute petitioner describes as the statutory counterpart of CEA §4b (PB 19), was held by this Court to have been enacted for the *especial* benefit of an investment adviser's *customers*, *TAMA*, *supra*, at 17, the obvious statutory counterpart to the trading customers of a futures commission merchant under the CEA. Indeed, the specificity of the statute undermines any at-

[13] *Id.* at 1783 (Concurring opinion of Justices Rehnquist, Burger, Stewart and Powell).

tempt to argue that §4b was not enacted for the *especial* benefit of commodity futures traders.

Section 4b of the CEA, the statutory provision upon which respondents rely in the instant action, provides in pertinent part as follows:

> It shall be unlawful (1) for any member of a contract market . . . in or in connection with any order . . . for or on behalf of any other person, or (2) for any person, in or in connection with any order to make, or the making of, any contract of sale of any commodity for future delivery . . . for or on behalf of any other person . . .
>
> (A) to cheat or defraud or attempt to cheat or defraud *such other person;*
>
> (B) willfully to make or cause to be made to *such other person* any false report or statement thereof, or willfully to enter or cause to be entered for *such person* any false record thereof;
>
> (C) willfully to deceive or attempt to deceive *such other person* by any means whatsoever in regard to any *such* order or contract or the disposition or execution of any such order or contract, or in regard to *any act of agency* performed with respect to such order or contract *for such person*; or
>
> (D) to bucket *such order*, or to fill such order by offset against the order or orders of any other person, or willfully and knowingly and without the prior consent of *such person* to become the buyer in respect to any selling order of *such person*, or become the seller in respect to any buying order of *such person*. (Emphasis added).

As emphasized in the dissenting opinion of Judge Mansfield in *Leist v. Simplot, supra*, at 332, only the person on whose "behalf" a contract is made is protected by §4b from fraud and deceit on the part of the exchange member who is making that contract. The "person" is the customer for whom the futures contract is made. The introductory paragraph defines the subject matter of the action

in terms of a "contract of sale . . . for or on behalf of any other person." Subsections (A), (B), (C) and (D) then limit the prohibited activities to certain forms of fraud by the broker upon "such other person" (*i.e.*, his customer) or in relation to "such order." A violation of §4b can occur *only* when a member of a contract market, such as the petitioner in the instant case, cheats or defrauds his own customer.[14]

The preceding analysis underlines the specific thrust of §4b and rebuts the petitioner's inaccurate assertions that the anti-fraud provisions of §4b are "broad" and "proscribe, in essence, cheating or defrauding by 'any person', of any 'other person' in connection with commodity futures transactions." (PB 25). As stated in *Berman v. Bache, Halsey, Stuart, Shields, Inc.*, 467 F.Supp. 311, 322 (S.D. Ohio 1979), a case which ultimately decided against implication of a private right of action under the CEA:

> First, there is little question that the plaintiff is a member of the class for whose "especial" benefit the statute was enacted. Indeed, 7 U.S.C. Section 6b is so concerned with the protection of the purchaser of commodities futures contracts that it creates liability for fraud only on the part of members of a contract market or one who makes a sale on behalf of any other person (i.e., a purchaser). There is no provision proscribing fraud on the part of the purchaser in 7 U.S.C. Section 6b. It is also felt that the 1974 amendments were largely motivated by a desire to protect the less sophisticated general investor who was becoming increasingly involved in the trading of commodities futures. *See* Schief & Markham, *The Nation's "Commodity Cops" — Efforts by the Commission to Enforce the Commodity Exchange Act*, 34 Business Law. 19 (Nov., 1978) and the legislative history cited therein. The Court is therefore of the opinion that the first factor of the analysis . . . favors the implication of a private cause of action.

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[14] *Leist v. Simplot*, 638 F.2d 283, 331-33 (2d Cir. 1980) (Mansfield, J., dissenting).

In its brief before this Court, petitioner avoids an analysis of the precise statutory language contained in §4b. Instead, petitioner diverts attention from the proper statutory analysis by a misplaced assertion that the CEA, taken as a whole, was not enacted for the especial protection of any particular class. (PB 23-26). Particular emphasis is placed by petitioner on the jurisdictional language contained in §3 of the CEA. Petitioner's argument is wide of the mark for two reasons. First, the historical context of §3 indicates that its sole purpose was to provide a constitutional basis upon which the CEA could be sustained. The first Congressional attempt to regulate commodity futures trading was the Future Trading Act, 42 Stat. 187 (1921), which not only regulated such trading but also imposed a tax on all grain futures contracts not traded on a designated contract market. This statute was subsequently held by this Court to be an unconstitutional exercise of the taxing power. *Hill v. Wallace*, 259 U.S. 44, 66-67 (1922). The statute was immediately redrafted as The Grain Futures Act, 42 Stat. 998 (1922), the taxing power was deleted, and the predecessor to §3 of the CEA was enacted. The stated purpose behind the addition of §3 was to provide a sufficient basis for this Court to conclude that the Act was within the power of Congress to regulate interstate commerce,[15] a fact expressly recognized by this Court later that same year, when the constitutionality of the Act was upheld. *Board of Trade v. Olsen*, 262 U.S. 1, 31-33 (1923). Second, the legislative history of §4b, which can be traced as far back as 1934, refutes petitioner's contention that it was not enacted for the especial benefit of persons such as the Currans in the instant case. The fact that §4b affords protection only to the *customer* of a commodity futures broker has been repeatedly recognized. *See*, for example, H.R. REP. NO. 1637, 73d Cong., 2d Sess. 5 (1934) ("Section 4b prohibits traders in acting *for customers*

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[15] *See* 62 CONG. REC. 9404 (June 26, 1922) (remarks of Chairman Tincher of the House Committee on Agriculture: "We have defined interstate commerce, using the language of the Supreme Court, as applying to grains and this law will not apply to any transaction except interstate transactions as defined by the court."); *id.* at 12723 (Sept. 15, 1922) (The Court "called attention to the fact that if grain was in interstate commerce we could reach the situation in this bill; and this bill is strictly following the dictation . . . of the Supreme Court . . .").

in futures transactions to cheat, defraud, or deceive *customers*") (emphasis added); H.R. REP. NO. 421, 74th Cong., 1st Sess. 5 (1935) ("Section 4b makes it unlawful for members of contract markets . . . to cheat, defraud, or deceive *the customer*") (emphasis added); 113 CONG. REC. 23652 (Aug. 22, 1967) (testimony of Assistant Secretary of Agriculture Mehrens that the "proposed legislation . . . would . . . give *customers* who deal in commodity futures with nonmembers the full protection of the Act") (emphasis added).[16]

Furthermore, there is ample evidence that the massive amendments to the CEA in 1974 were motivated by a desire to protect all traders on the commodity futures markets, whether that trader was classified as a hedger or as a speculator.[17] As stated in Reynolds, *supra*, at 807, the 1974 Congress "amended the CEA in response to charges that existing legislation was inadequate to protect individuals trading on the commodities markets." Of particular concern to the 1974 Congress was the fact that investors in nonregulated commodities markets were not protected by the existing legislation, *see* INTERIM REPORT, *supra*; *1974 Hearings* at 225 (statement of Tom Maher); *Hearings Before the House Committee on Agriculture for a Review of Commodity Exchange Act and Discussion of Possible Changes*, 93d Cong., 1st Sess. 79 (1973) (hereinafter "*1973 Hearings*") (statement of Joel Bellows, Esq. that "a substantial part of my practice . . . is the representation of investors and speculators who have been bilked and cheated by bandits operating in and on the periphery of the commodities markets"); *1973 Hearings* at 11 (remarks of Rep. Smith that the investing public lost over 100 million dollars in a scheme of selling puts and calls in nonregulated commodities), and that the existing regulatory authority needed to be strengthened in order to protect investors.

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[16] In accord with the statements in the text is *Chisper v. Kohmeryer & Co.*, 600 F.2d 1061, 1065 n. 7 (5th Cir. 1979) ("Section 4b makes it unlawful for a commodities broker to 'cheat or defraud' a *customer* or willfully to deceive or make false statements or reports to a *customer* in connection with transactions on the commodities exchange.") (emphasis added).

[17] This aspect of the legislative history of the CEA is examined in more detail in *Leist v. Simplot*, *supra*, at 304-07.

1974 Hearings at 366 (statement of Judy Jackson which refers to the "regulatory failure of the [CEA] . . . which have been detailed in a series of pioneering articles in the 'Des Moines Register' and most recently in a May 5, 1974 GAO report on the CEA"); *1974 Hearings* 438 (statement of Joseph J. Bianco, Yale Legislative Services); *1974 Hearings* at 371 (remarks of Sen. Humphrey, sponsor of S.2485).

Section 4b of the CEA is unlike the statute analyzed by this Court in *California v. Sierra Club, supra*, which the petitioner claims to be "dispositive" of this issue. (PB 25). In *Sierra Club*, a private lawsuit was brought by an organization which represented the general public, which is hardly a precise enough class of plaintiffs to warrant treatment as *especial* beneficiaries under the statute then in question. By contrast, however, the proscriptions of §4b prohibit conduct towards an extremely limited class of individuals, *i.e.*, a broker's *customers*, and it appears axiomatic that such *customers* are the very class of persons for whose *especial* benefit §4b of the CEA was enacted. In this case, the first *Cort* factor must clearly be resolved in favor of the respondents.[18]

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[18] The other cases cited by petitioner to support its position that no cause of action should be implied under §4b of the CEA are simply inapposite, because the statutes construed in those cases were not enacted for the benefit of any *especial* class. For example, in *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136 (1980), *cited in* PB 4, 21-22, this Court held that the explicit provisions of the Freedom of Information Act (FOIA), 5 U.S.C. §552, had not been violated, *id.* at 150, and so the only statutes which conceivably could have supported the private right of action were the Federal Records Act of 1950, 44 U.S.C. §§2901 *et seq.* and the Records Disposal Act, 44 U.S.C. §3314, which can scarcely be argued to have been enacted for the *especial* benefit of persons requesting information under FOIA. In *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, ___ U.S. ___, 101 S. Ct. 2615 (1981), *cited in* PB 21, 27-28, 31, the statutes provided an explicit civil remedy for "any person" who followed the requirements of those statutes. *Id.* at 2620 n. 11, 2623-24. No private right of action beyond that explicit in the statute was provided, which is hardly surprising since the statutes involved, the Federal Water Pollution Control Act, as amended, 33 U.S.C. §§1251 *et seq.* and the Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. §§1401 *et seq.*, were designed to regulate

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II.

EXPLICIT AND IMPLICIT INDICATIONS OF LEGISLATIVE INTENT SHOW THAT CONGRESS INTENDED FOR A PRIVATE RIGHT OF ACTION TO BE AVAILABLE UNDER SECTION 4b.

Turning to the second and most important of the *Cort* factors, *Touche Ross & Co. v. Redington, supra*, at 575, our inquiry focuses on whether there is any indication of legislative intent, explicit or implicit, either to create a private remedy or to deny one. *Cort v. Ash, supra*, at 78.

At the outset, reference must be made to the judicial climate in which the 1974 revisions to the CEA occurred. At the time the CEA was amended in 1974, it was the unanimous interpretation of the federal courts that §4b of the CEA afforded a private remedy for

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the dumping of materials into the ocean and to regulate water pollution, and were not designed for the *especial* benefit of any class of persons. In *Northwest Airlines, Inc. v. Transport Workers Union, supra, cited in* PB 21, 27, 38, the plaintiff who argued for the implication of a private remedy was a member of the very class which Congress sought to regulate and could "scarcely lay claim to the status of 'beneficiary' whom Congress considered in need of protection." *Id.* at 1581. *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979), *cited in* PB 4, 19, 21, 23, 26, 31-32, held that no private right of action existed for violations of §17(a) of the Securities Act of 1933, 15 U.S.C. §77q(a), described as simply a reporting statute which "neither confers rights on private parties nor proscribes any conduct as unlawful." *Id.* at 569. Finally, the case most heavily relied upon by petitioner, *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979), *cited in* PB 4, 15-16, 19-23, 25-27, 32, concluded that the plaintiff was a member of the precise class for whose *especial* benefit the statute had been enacted, 444 U.S. at 17, but the Court also concluded that a private right of action — specifically, the right to seek rescission in federal courts — was implicitly provided to such plaintiffs. *Id.* at 18-19.

commodity futures traders against their own brokers.[19] As noted by this Court in *Cannon, supra*, at 698-99, "our evaluation of congressional action . . . must take into account its contemporary legal context." The circumstances of the 1974 amendments to the CEA are extremely analogous to those circumstances analyzed by this Court in *Cannon, supra*. In that case, this Court was faced with the task of determining whether the specific remedy provided by Title IX of the Education Amendments of 1972 precluded an implied cause of action for a victim of prohibited discrimination. The language construed in *Cannon* was identical to that found in Title VI of the Civil Rights Act. As this Court noted, "when Title IX was enacted, the

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[19] Prior to 1974, it was undisputed that a private right of action existed for violations of the CEA. The first case expressly to hold that a private right of action existed in favor of a futures trader against his broker was *Goodman v. H. Hentz & Co., supra*. The district court in *Goodman* implied a private right of action, primarily on the "tort" theory espoused in *Kardon v. National Gypsum Co.*, 69 F.Supp. 512 (D.C. Pa. 1946). Significantly, the *Goodman* case involved violations of §4b of the CEA, the very provision involved in the instant controversy.

Reasoning from *Goodman*, an unbroken line of cases likewise implied a private right of action under the CEA, generally based upon little more than a citation to *Kardon, Goodman* and their progeny. *Anderson v. Francis I. duPont & Co.*, 291 F.Supp. 705, 710 (D.C. Minn. 1968) (investors claiming inducement into fraudulent commodities investment scheme); *Booth v. Peavey Co. Commodity Services*, 430 F.2d 132, 133 (8th Cir. 1970) (churning, violation of CEA §4b(A)); *United Egg Producers v. Bauer International Corp.*, 311 F.Supp. 1375, 1384 (S.D.N.Y. 1970) (injunction granted against violations of CEA §9(b)); *McCurnin v. Kohlmeyer & Co.*, 340 F.Supp. 1338, 1343 (E.D. La. 1972) (private right under CEA §4b(B) since "such a cause of action has been repeatedly recognized"); *Arnold v. Bache & Co., Inc.*, 377 F.Supp. 61, 65 (M.D. Pa. 1973) (fraud perpetrated by FCM against his customer); *Hecht v. Harris, Upham & Co.*, 283 F.Supp. 417, 437 (N.D. Cal. 1968), *modified* 430 F.2d 1202 (9th Cir. 1970); *Gould v. Barnes Brokerage Co., Inc.*, 345 F.Supp. 294, 295 (N.D. Tex. 1972); *Seligson v. New York Produce Exchange*, 378 F.Supp. 1076, 1084 (S.D. N.Y. 1974), *aff'd sub nom. Miller v. New York Produce Exchange*, 550 F.2d 762 (2d Cir.), *cert den.* 434 U.S. 823 (1977). Significantly, not a single pre-1974 decision denied that a private remedy was available to redress violations of the CEA. This Court even had the opportunity to address this issue tangentially, dealing with the doctrine

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critical language in Title VI *had already been construed* as creating a private remedy ... repeatedly cited with approval and never questioned during the ensuing five years." *Cannon, supra*, at 696 (emphasis added). Similarly, for a period of seven years prior to the 1974 revision of the CEA, the anti-fraud provisions contained in §4b of the CEA had been construed as creating a private remedy. As noted by the concurring opinions of Justices Rehnquist and Stewart, the judicial climate of that time "gave Congress good reason to think the federal judiciary would undertake this task." *Id.* at 718. The circumstances surrounding the enactment of the CFTCA make these observations in *Cannon* even more compelling in the case at bar.

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of primary jurisdiction. In *Chicago Mercantile Exchange v. Deaktor*, 414 U.S. 113, 115 (1973), this Court stated that "the *Deaktor* plaintiffs, who alleged violations of the Commodity Exchange Act and the rules of the Exchange, should be routed in the first instance to the agency whose administrative functions appear to encompass adjudication of the kind of substantive claims made against the Exchange in this case." The obvious implication of this Court's decision was that a determination by the Commission "in the first instance" would assist a judicial resolution of plaintiff's claims "in the second instance." *Leist v. Simplot, supra*, at 301.

In addition to the foregoing cases, each of which was decided before the 1974 amendments here in issue, several cases decided on pre-1974 facts after the 1974 amendments continued to uphold the existence of a private right of action under the CEA. *Case & Co., Inc. v. Board of Trade*, 523 F.2d 355 (7th Cir. 1975); *Hirk v. Agri-Research Council, Inc.*, 561 F.2d 96, 103 n.8 (7th Cir. 1977) ("[p]rivate damage actions are allowable under the CEA"); *Bartley v. P.G. Commodities Associates, Inc.*, [1975-1977] COMM. FUT. L. REP. (CCH) ¶20,123 (S.D.N.Y. 1975). Although more recent cases have been divided on the issue whether private rights of action should continue to be implied under the CEA in light of the recent decisions of this Court, *see Leist v. Simplot, supra*, at 302 n. 19, it cannot be denied that such rights of action were universally recognized in 1974. Perhaps the most persuasive evidence of this belief is that petitioner, when this case was argued before the Sixth Circuit Court of Appeals, never disputed the Currans' position that "a private cause of action exists for violations of the CEA." (RC A-4-5).

The adoption of the CFTCA represented "the first complete overhaul of the Commodity Exchange Act since its inception", H. R. REP. NO. 93-975, *supra*, at 1; *1974 Hearings* at 768 (statement of American Cotton Shippers Ass'n). Because the 1974 revision represented such a "complete overhaul", it has been recognized by every court to consider this issue that the relevant legislative intent must relate to the 1974 revision. *Rivers v. Rosenthal & Co.*, *supra*, at 782. This is true even though the predecessor to §4b (the anti-fraud provision at issue in this case) was enacted as long ago as 1936, since "the overall 'regulatory scheme as it exists today is a product of the 1974 amendments'". *Id.* at 783, *citing Navigator Group Funds v. Shearson Hayden Stone, Inc.*, 487 F.Supp. 416, 420 & n.6 (S.D.N.Y. 1980). Accordingly, the re-enactment of §4b in the identical language of its predecessor, with full knowledge of the interpretation the courts had given to that language, under the then existing judicial climate, is a compelling indication that Congress did not intend to overrule that interpretation. *See* the opinion of the Court below, at PC A-31, n. 27 and cases cited therein.

It cannot seriously be doubted that Congress was very much aware that private rights of action had been implied by the federal judiciary for violations of the CEA. Representative Poage, the sponsor of H.R. 13113, which eventually was adopted as the basis for the 1974 revisions to the CEA, introduced his bill with the statement that the "courts implied a private remedy for individual litigants in the Commodity Exchange Act". 119 CONG. REC. 41333 (1973). Although it is true, as petitioner points out, that Rep. Poage was concerned that the existence of private remedies against the *exchanges themselves* might be having a perverse effect upon the regulatory scheme, in that the exchanges were being advised by their counsel not to adopt rules for the protection of their customers to forestall private litigation in the event such rules were not enforced, *id.*; *see also* PB29, and that similar sentiments were expressed by other lawmakers, H. R. REP. NO. 93-975, *supra*, at 46; 120 CONG. REC. 10748 (1974) (remarks of Rep. Throne), it is significant that not a single legislator expressed disapproval of the existence of a private right of action by investors, such as the Currans, against *their own brokers*. In the face of the universal recogni-

tion that such private rights of action existed, the failure of any legislator to criticize the effects of such private remedies is highly significant. The remarks of Reps. Poage and Throne cited to above indicate an awareness that a private right of action existed under the CEA, and neither legislator made the slightest suggestion that implicit private remedies for a customer against his broker were unfounded or should in any way be curtailed.

Petitioner suggests that the opinions of Judges Friendly and Mansfield in *Leist v. Simplot, supra*, and of Judge Reavley in *Rivers v. Rosenthal & Co., supra*, along with the briefs filed by persons in support of the implication of a private remedy under the CEA, indicate a lack of any *persuasive* evidence of Congressional intent to imply a private right of action. (PB28). On the contrary, although much of the Congressional debate was concerned with such issues as the independence of the Commodity Futures Trading Commission, whether the commissioners should serve full- or part-time, whether dual trading of brokers for their own accounts and for their customers should be allowed, and the extent of injunctive power which should be vested with the Commission, *see 1974 Hearings* at 371-73 (statement of Sen. Humphrey), it can not be seriously disputed that: (1) *every* federal court to consider the issue prior to 1974 had determined that a private right of action existed under the CEA; (2) Congress was plainly aware of such judicial decisions; (3) not a single legislator criticized the implication of a private remedy on behalf of a customer against his broker; (4) no provision was enacted which would restrict access to the courts to private litigants; and (5) the remedies explicitly provided by the CEA cannot be harmonized without the implication of a private right of action for aggrieved traders, such as the Currans in the instant case. The inescapable conclusion is that the 1974 Congress plainly intended that a private right of action would exist for violations of §4b of the CEA on behalf of a customer against his broker. Point (1) has been adequately addressed in n. 19, *supra*, and points (3) and (4) can be proven by a complete reading of the voluminous hearings and committee reports issued in connection with the 1974 amendments. Thus, Part II-A considers point (2) above, *i.e.*, whether the 1974 Congress knew that private remedies had been judicially implied under the

CEA and Part II-B considers point (5) above, *i.e.*, the necessity for private remedies to continue under the statutory scheme. Finally, Part II-C responds to specific issues raised in petitioner's brief with regard to the 1978 amendments to the CEA.

A. The Legislative History of the CFTCA Indicates that Congress Was Aware of and Approved the Judicially Implied Private Right of Action Under Section 4b of the CEA.

In addition to the remarks of Reps. Poage and Throne referred to above, the legislative hearings surrounding the 1974 amendments to the CEA are replete with references to the existence of a private cause of action. Testimony received on behalf of the commodity exchanges should have made it perfectly clear to any legislator that a private right of action existed to redress violations of the CEA. For example, Alvin W. Donahoo, Executive Vice President of the Minneapolis Grain Exchange, furnished the following written response to the Senate committee:

> QUESTION 8. Why limit customer claims to $5,000 or $10,000 if the exchanges are working legally, efficiently and equitably?
>
> ANSWER. We believe that if a customer has a claim in excess of $10,000, he should hire an attorney to make certain that all facts are presented. We are advised by our counsel that *facts in large claims can best be established through the discovery procedure envisioned in the Federal Rules of Civil Procedure in the Federal court*. For these reasons, we believe that customer claims should be limited to $10,000 and *claims in excess of that amount should be decided by the courts*.

1974 Hearings at 403 (emphasis added). Mr. Donahoo's oral testimony was consistent with his written statement, as he favored a market-sponsored claim procedure for more modest claims, since the small size of such claims serves as an "economic impediment to Court litigation". *1974 Hearings* at 415. It is significant that the

1974 legislation contained a provision requiring exchanges to provide for "voluntary arbitration" of customer claims not in excess of $15,000. CEA §5a(11). Such provision, as evidenced by use of the word "voluntary" and the testimony of Mr. Donahoo, was enacted for the purpose of providing an alternative remedy to costly court litigation for private litigants with moderate claims. *See also* [1975-1977] COMM. FUT. L. REP. (CCH) ¶20,111, "Arbitration Or Other Dispute Settlement Procedures: Amendment of Prior Proposed Rules" (November 18, 1975), in which the CFTC recognized the Congressional intent behind this arbitration provision was to permit the expeditious handling of smaller claims and that larger claims generally required the "safeguards available in a court of law".

Frederick G. Uhlmann, Chairman of the Board of the Chicago Board of Trade, expressed sentiments similar to those of Mr. Donahoo. In response to a direct inquiry regarding the desirability of an administrative appeal from customer settlement procedures established by the exchanges, Mr. Uhlmann noted that "*it would eliminate much risk of litigation by persons* who are *either ordered to make adjustment* or are *denied adjustment*" and favored an appeals procedure for customer claims in excess of some minimum amount such as $2,500. *1973 Hearings* at 131-32 (emphasis added). Mr. Uhlmann noted that unless the customer was bound by the arbitration award, "obviously he will take every adverse decision to the Commission or to the courts". *1974 Hearings* at 524. References to private rights of action were also made by Reed Clark, representing the New York Coffee and Sugar Exchange. According to Mr. Clark, exchange determinations of customer complaints "*can be reviewed by the courts*, and to interpose a government agency between any exchange and the courts would serve only to add another appellate level — with resultant expense and delay — to disputes between customers and exchange members". *1973 Hearings* at 119 (emphasis added). Charles W. Chapin, also a representative of the New York Coffee and Sugar Exchange, prophetically testified that the provision for reparations "would cause jurisdictional confusion as to the interrelationship between the arbitration procedures afforded by the contract markets, the complaint mechanism of the Commis-

sion and the judicial relief available through the courts." *Hearings on H.R. 11955 Before the House Committee on Agriculture*, 93d Cong., 2d Sess. 249 (1974) (hereinafter "*H.R. 11955 Hearings*"). Michael Weinberg, Jr., Chairman of the Board of the Chicago Mercantile Exchange, testified that, if a customer has a complaint which is not satisfactorily resolved through administrative processes, "*of course, there is the ultimate opportunity of recourse to the courts*". *1973 Hearings* at 198 (emphasis added). David T. Johnston, Senior Vice President and Director of E. F. Hutton, criticized the concept of voluntary arbitration on the grounds that "if the individual doesn't agree with the arbitration, he can then initiate proceedings in the courts to reopen the matter". *1974 Hearings* at 674. Because resort to the courts was already available, William F. Brooks, President and General Counsel of the National Grain Trade Council, questioned whether the proposed reparation procedures would prevent any mischief. *H.R. 11955 Hearings* at 52. Warren W. LeBeck, President of the Chicago Board of Trade, summarized the rules of that exchange as follows:

> The Board of Trade established several years ago a review committee to which customer complaints could go and we have in addition an appeals committee above and beyond that and *the customer, of course, still has access to the courts*.
>
> * * *
>
> [I]n our rules, for example, we have both an arbitration committee and an appeals committee, so there is a review of this matter, and then, *of course*, if there are allegations that there has been conspiracy or fraud or deceit, *they can go to court*. . . .

1974 Hearings at 526 (emphasis added). Paul H. Franklin, representing Merrill Lynch, Pierce, Fenner & Smith, the petitioner herein, testified that if arbitration was unacceptable to his firm's customers that "the matter could be referred to courts". *H.R. 11955 Hearings* at 331. In fashioning the structure and limited availability of the remedies of arbitration and reparations, Congress must be presumed to have relied upon the testimony of the exchange offi-

cials that a private right of action was available to an aggrieeved trader.

The legislators were also reminded by individuals other than exchange representatives that private remedies existed under the CEA. For example, the INTERIM REPORT, *supra*, summarized the plight of a customer trading in a nonregulated commodity who alleged that his broker had defrauded him and who had "exhausted all possible sources of assistance, *except legal action*, without gaining any satisfaction" (emphasis added). A bitter letter addressed to Sen. Hansen exposed the fraudulent tactics used by the commodity exchange to require liquidation at a depressed price when an unwary rancher purchased future contracts with the intention of accepting delivery of the cattle. The letter concluded with the remarks that "I recognize that I have to take appropriate legal action to protect myself". *1974 Hearings* at 788. Numerous articles initially published in the Des Moines Register indicate a general public awareness that private remedies were available to redress violations of the CEA. *See particularly* 119 CONG. REC. 5642 ("only recently have a few victims begun to strike back by filing lawsuits demanding repayment of money they have lost in alleged price manipulation schemes"); *id.* at 5644 (lawsuits by producers and commodity traders for $2,000,000 in damages); *id.* at 5649-50 (summary of the lawsuits filed by Bernard Rosee, which ultimately resulted in a judgment of $700,000). Alex Caldwell, Director of the Commodity Exchange Authority, discussed the problem of defaults on forward contracts by stating that "[l]awsuits are the only way you can handle it now". *1974 Hearings* at 251. Joel Bellows, a practicing attorney, testified that a substantial part of his practice was "the representation of investors and speculators who have been bilked in and cheated by bandits operating in and on the periphery of the commodities markets". *1973 Hearings* at 79. Dr. Roger W. Gray, Professor of Law at Stanford University, provided the following example of churning:

> An attorney, a firm of attorneys that had a client that they thought they had wanted to defend who was a future commission brokers, *and suit had been brought against him by his customers*, and it turned out that they

> had a $10,000 account and in 6 months they had lost $17,000. They lost their $10,000 plus seven more. And in those 6 months this man had earned $38,000 commission off of that $10,000 account.

1974 Hearings at 283.

In addition to the foregoing statements, the legislators themselves expressly indicated their belief that recourse to the federal courts was available to private litigants to redress violations of the CEA. Rep. Throne, for example, stated that the 1968 amendments to the CEA had implicitly granted private parties the right to sue the exchanges for nonenforcement of their rules designed to protect investors. 120 CONG. REC. 10748 (1974). Rep. Poage observed that "when the [CEA] was enacted, courts implied a private remedy for individual litigants in the [CEA]". 119 CONG. REC. 41333 (1973). Sen. Clark, in construing §4b — the precise statute involved in this lawsuit — stated that it "simply tries to convey the idea that it is unlawful for any person to cheat or defraud another person." *1974 Hearings* at 687. Professor Glenn Willet Clark, in response to the Senator's observation, then suggested that "a *cleaner approach* would be to use verbatim the language from the SEC's present rule 10b-5, incorporate that in the Act." *Id.* at 687 (emphasis added). The obvious implication of this testimony is that §4b should be construed in much the same manner as Rule 10b-5, which has been interpreted by this Court to support a private right of action for defrauded investors.[20] It is noteworthy in this regard that none of the legislators suggested that an interpretation of §4b similar to that of Rule 10b-5 would be inappropriate.

As the foregoing analysis of the legislative history clearly indicates, members of Congress were plainly aware of the judicial implication of a private right of action under §4b of the CEA and anticipated that such private remedy would continue, a critical distinc-

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[20] In *Superintendent of Insurance of New York v. Bankers Life & Casualty Co.*, 404 U.S. 6 (1971), this Court stated that "[i]t is now established that a private right of action is implied under § 10(b)". *Id.* at 13 n. 9. This Court unanimously agreed that "Section 10(b) must be read flexibly, not technically and restrictively." *Id.* at 12.

tion between this case and other recent decisions of this Court which have declined to imply a private right of action. *See California v. Sierra Club, supra*, at 1781. As noted by Judge Friendly in *Leist v. Simplot, supra*, "[i]t is just as much 'judicial legislation' for a court to withdraw a remedy which Congress expected to be continued as to improvise one that Congress never had in mind." *Id.* at 313. The judicial climate[21] at the time of the 1974 amendments certainly gave Congress no reason to suspect that a private remedy would not continue to be implied by the federal courts. *Cannon, supra*, at 718 (Justices Rehnquist and Stewart, concurring). As noted in *Cannon, supra*, at 686-87 n. 7, judicial interpretation of a federal statute may take into account the fact that "many 'members of Congress may have assumed that private suits were authorized' ". The long-standing judicial recognition of a private right of action for violations of CEA §4b is a critical distinction between the cases relied upon by petitioner and the case *sub judice*. None of the cases cited by petitioner has dealt with the interpretation of a comprehensive statutory scheme which had been enacted in the face of uniform federal court decisions recognizing the existence under identical statutory language of an implied federal right of action.[22]

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[21] *See also* the remarks of Justice Powell, dissenting, in *Cannon, supra*, concerning "... the more or less haphazard line of cases that led to our decision in *Cort v. Ash* ..." *Id.* at 731.

[22] Absent express indications to the contrary, the re-enactment of statutory language (such as §4b of the CEA) in substantially the same form or its wholesale adoption into a different statutory scheme, presumes legislative intent to perpetuate and incorporate the existing judicial interpretation of that language. *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978); *Electric Storage Battery Co. v. Shimadzu*, 307 U.S. 5, 14 (1939); C. SANDS, SUTHERLAND ON STATUTORY CONSTRUCTION, § 49.09 (4th ed. 1973). In *Lorillard v. Pons, supra*, at 580, it was observed that "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change," even where — as here — the judicial interpretations were those of lower federal courts. The *unanimity* of these federal court decisions is particularly significant. *Id.* Although the presumption is rebuttable, the 1974 amendments are patently insufficient to rebut that presumption, in light of the explicit Congressional recognition of judicially implied private rights of action and the express Congressional purpose to increase protection for commodity futures traders.

B. The Statutory Structure of the CEA is Incomplete Without the Implication of a Private Cause of Action and Rebuts any Argument that Reparations Was Intended to be the Exclusive Remedy.

As against this overwhelming evidence that Congress intended for the continuation of private rights of action under §4b of the CEA, petitioner argues that the reparation proceedings provided by §14 of the CEA, 7 U.S.C. §18, were intended by the 1974 Congress to be the *exclusive* remedy for aggrieved commodity futures traders, such as the Currans. Petitioner describes the reparation proceedings as being "[o]f particular importance to the instant case". (PB 11). Respondents fail to see why. The reparation proceedings are, by their terms, unavailable with respect to any cause of action which accrued before January 23, 1975. CEA §14(i); CFTC Reg. §12.21; *Hornblower & Weeks — Hemphill Noyes, Inc. v. Csaky, supra.* Since the Currans' discretionary accounts were liquidated in April, 1974, it is quite clear that the reparation provisions are not of any particular importance to the instant case. Despite petitioner's argument that reparations provide an acceptable "alternative remedy" for the Currans, a holding by this Court that an implied private right of action is not available to the Currans would effectively deprive them of any federal remedy.

The evidence that depriving respondents of a federal remedy would frustrate the intent of the legislature is particularly compelling. Petitioner accurately states in its brief that "[i]n construing the CEA there is no reason for a court to speculate whether Congress intended that persons aggrieved by violations of the Act be entitled to recover damages. *Plainly, Congress did so intend* ...." (PB 20) (emphasis added). In light of this acknowledged Congressional intent to fashion *some* remedy, respondents cannot accept petitioner's arguments that they be left without *any* remedy for violations of the CEA.[23] Congress enacted a federal statute which imposes upon peti-

[23] Clearly §5a(11) of the CEA, requiring each contract market to provide for voluntary arbitration of customers' claims under $15,000, is of no avail to the Currans, whose damages far exceed that minimal amount. As mentioned in the

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tioner federal duties toward persons such as the Currans, and Congress intended for civil remedies to be available to redress violations of that statute. If this Court accepts petitioner's arguments in this case, however, the Currans will be left without any remedies whatsoever for the damages suffered as a direct result of petitioner's violations of the CEA, a result which clearly could not have been foreseen or intended by Congress.

Although not necessary to the disposition of the instant case, an analysis of the CEA leads to the conclusion that reparations was not intended to be the exclusive remedy even for those plaintiffs for whom reparations may be available. Despite the panoply of fines and potential liability of a futures commission merchant, such as the petitioner in the instant case (PB 10-14), only two provisions of the CEA explicitly provide for any recovery of damages by a futures trader against his broker, neither of which was designed to afford complete relief. Section 5a(11) of the CEA requires contract markets to provide a fair and equitable arbitration procedure for the settlement of customers' claims and grievances against any member of the exchange or employee thereof, provided that: (1) the use of such procedure by a customer must be voluntary; (2) the procedure is not applicable to any claim in excess of $15,000; and (3) the procedure must not result in any compulsory payment except as agreed upon between the parties. The arbitration procedure which must be established is clearly intended as a supplemental remedy — the decision to arbitrate must be *voluntary* on the part of the customer and claims in excess of $15,000 are simply not covered.

The remaining remedy explicitly provided for defrauded investors by the CEA is reparations, CEA §14, upon which petitioner so heavily relies. (PB 11-14). Reparations, however, is available only

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text, the Currans are not entitled to invoke the benefits of a reparations proceeding. A *parens patriae* suit expressly authorized by the 1978 amendments to the CEA was not even theoretically available to the Currans when this lawsuit was commenced. Finally, a cause of action based solely upon a violation of the CEA may not be raised in state court.

to claims which arose *after* January 22, 1975, CEA §14(i), and the Currans' claims arose before that date. Even if available, the procedure envisioned by the statute is intended to be merely an expedited administrative hearing.[24] There is an express denial of an opportunity for a formal hearing where the damages claimed do not exceed $2,500[25] and the possibility for a waiver of such hearing in all other cases by the *person against whom the complaint has been made*. CEA §14(b). Thus, the individual filing a reparations complaint has no statutory right to demand a formal hearing.[26] Petitioner asserts that reparation proceedings "provide claimants with every opportunity fully and fairly to present their claims as in a court of law" (PB 12), but if the CFTC determines, *in the first instance*, that the facts alleged in the complaint do not warrant any further action, there is no administrative or judicial review explicitly provided for this denial of any relief.[27] Far from being a full and fair *exclusive* alternative to the courts, "[t]he 1974 legislation envisioned the Commission's reparations proceedings as being analogous to the operation of a small claims court." S. REP. NO. 850, 95th Cong., 2d Sess. 16 (1978), *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 2087, 2104 (hereinafter "S. Rep. No. 95-850").

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[24] Reparations proceedings have become anything other than expeditious. The number of pending cases has increased from 379 at the end of fiscal year 1978 to 740 at the end of fiscal year 1979. [1979] COMMODITY FUTURES TRADING COMM'N ANN. REP. 29. When the CEA was amended in 1978, Congress was aware that the reparations backlog could be expected to continue. S. REP. NO. 95-850, *supra*, at 16.

[25] The dollar limit, set in CEA §14(b), was raised in 1978 from $2,500 to $5,000 by P.L. 95-405, Section 21(3) (1978).

[26] Although the statute does not require the consent of the complainant to the waiver of a formal hearing in cases where reparations complaints exceed $2,500 ($5,000 after 1978 amendments), CFTC Reg. §12.71(a)(1) requires a hearing "unless all the parties have waived their right to a hearing." It is significant that this important procedural safeguard is not provided by the statute. The reference in §14(b) to "such person" with a right to a hearing refers only to the person charged with misconduct.

[27] CEA §§14(a), (b), (g).

The effective dates of the 1974 amendments to the CEA lend further support to the position advocated by respondents and by the CFTC and rebuts petitioner's argument that Congress intended reparations to be the exclusive remedy for aggrieved traders. The CFTCA was made effective as of the 180th day after enactment of the law (October 23, 1974), although approval or modification of exchange by-laws to comply with the new law could take place prior to such 180th day. P.L. 93-463, §418(a) (1974). Unlike other provisions of the CFTCA, the reparation provisions did not become effective until *fifteen* months after October 23, 1974. CEA §14(i), 7 U.S.C. §18(i). The statute, if petitioner's arguments are accepted by this Court, would create three classes of potential plaintiffs: (1) those whose cause of action arose before January 23, 1975; (2) those whose cause of action arose between January 23, 1975 and January 23, 1976; and (3) those whose cause of action arose after January 23, 1976. The explicit remedies for each class of plaintiffs (excluding the opportunity for "voluntary" arbitration of claims not in excess of $15,000) would be as follows: (1) the first class of plaintiffs (to which respondents belong) have no remedy; (2) the second class of plaintiffs may initiate reparation proceedings, but not until after January 23, 1976; and (3) the third class of plaintiffs may initiate reparation proceedings immediately after their cause of action accrues. While a rational basis exists for the statutory distinction between the second and third classes of plaintiffs, particularly since the statute discriminates against the second class only to *delay* the time when a reparations complaint may be filed, without the implication of a private remedy there is no rational basis for the statutory discrimination against the first class of potential claimants who are completely foreclosed from electing reparations. Established tenets of statutory construction should lead this Court to eschew a construction of the statute yielding an unreasonable result in favor of a construction of the statute yielding a logical one.[28] Had Congress in-

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[28] "It has been called a golden rule of statutory interpretation that unreasonableness of the result produced by one among alternative possible interpretations of a statute is reason for rejecting that interpretation in favor of another which

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tended reparations to be the *exclusive* remedy for aggrieved traders, as urged by petitioner, this remedy would logically have been extended after the effective date of the CEA, to *all* traders who were defrauded by their brokers, even if their suits would have had to be delayed until after January 23, 1976. The only rational explanation for the Congressional failure to extend this particular administrative remedy to *all* futures traders damaged by a violation of the CEA was a belief that the CEA, as amended, *implicitly* provided an alternative civil forum — i.e., recourse to the federal courts, for such aggrieved traders. In fact, the comparison chart prepared by the staff of the Senate Committee on Agriculture and Forestry which listed fifteen major points of the existing law and the four bills then under consideration did not specify whether a private cause of action for simple monetary damages was provided in each bill. Although two bills, S. 2578 (§16) and S. 2837 (§505), provided separately for an express cause of action, the only description of either provision provided by the committee chart was that "civil actions may be brought by individuals for treble damages". *1974 Hearings* at 194. The only logical explanation for this omission is that an explicit statement that a private cause of action would exist under the CEA for simple monetary damages was deemed to be superfluous.

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would produce a reasonable result. It is said to be a 'well established principle of statutory interpretation that the law favors rational and sensible construction.'" C. SANDS, SUTHERLAND ON STATUTORY CONSTRUCTION, §49.09 (4th ed. 1973) (citations omitted). In the case *sub judice*, only the implication of a private remedy in favor of defrauded investors against their own brokers can relieve the absurdity of the interpretation which has been urged by petitioner upon this Court. A contextual interpretation of the CEA, allowing the statute to provide the private remedy which Congress *implicitly* created, removes any inconsistency in the statutory scheme and reaches the only defensible result in the instant case. For that reason, even if for no other, the implication of a private right of action for violations of §4b of the CEA are required by simple tenets of statutory construction. *Id.* at 67, *reprinting* Bruncken, *Interpretation of the Written Law*, 25 YALE L. J. 129 (1915).

Sen. Talmadge, in explaining the reparations provisions of the legislation, stated as follows:

> The vesting in the Commission of the authority to have administrative law judges and apply a broad spectrum of civil and criminal penalties *is likewise not intended to interfere with the courts in any way*. It is hoped that giving the Commission this authority will somewhat lighten the burden upon the courts, but the entire appeal process and the right of final determination by the courts are expressly preserved.

120 CONG. REC. 30459 (1974) (emphasis added). As noted by Judge Friendly in *Leist v. Simplot, supra*:

> The first sentence strongly suggests that Congress did not intend to repeal private rights of action by enacting the reparations procedure, and the second sentence is not to the contrary. If the reparations procedure was intended to be exclusive, then it *certainly* would lighten the burden on the courts, even with review of reparations orders by the courts of appeals. But the Senator spoke in terms of "hope" and lightening the burden "somewhat" — as if reparations were an alternative he hoped had been made attractive enough to sway some aggrieved traders away from the courts. The second clause relating to judicial review simply noted that even for those who elected reparations there could still be court involvement.

Id. at 313.

The majority opinion of the court below properly emphasized the point that the CFTC, the government agency charged with administration of the CEA, as amended in 1974, has *never* viewed reparations as providing for an exclusive remedy:

> The CFTC has consistently interpreted the reparations section as permitting commodity customers an election of forums in which to pursue their claims. *See* 41 Fed. Reg. 3994 (1976); 41 Fed. Reg. 18472 at n.5 (1976);

> *Stucki v. American Options Corp.*, CCH Comm. Fut. L. Rep ¶20,559 at 22,283 (CFTC 1978). The CFTC will not even entertain a reparation claim if civil court litigation involving the same facts and parties has been instituted. 17 C.F.R. §12.21(a)(7) (1977). We recognize that "...the consistent construction of a statute 'by the agency charged with its enforcement is entitled to great deference by the courts.' " *United States v. Consumer Life Insurance Co.*, 430 U.S. 725, 752, 97 S.Ct. 1440, 1454, 52 L.Ed.2d 4 (1977), quoting from *NLRB v. Boeing Co.*, 412 U.S. 67, 75, 93 S.Ct. 1952, 36 L.Ed.2d 752 (1973); *see also, Chemehuevi Tribe of Indians v. Federal Power Commission*, 420 U.S. 395, 409-10, 95 S.Ct. 1066, 43 L.Ed.2d 279 (1975).

PC A-33. *See also* "Reparation Proceedings", [1975-1977] COMM. FUT. L. REP. (CCH) ¶20,129 (January 27, 1976). ("These reparation rules provide the procedures by which a claimant may pursue one of the remedies the law will permit for the recovery of claims. The other available remedies are arbitration and the filing of a lawsuit in an appropriate state or federal court.")

Even without the aid of the legislative history of the CFTCA, the reparations procedure is insufficient on its face to have been intended by Congress as an exclusive private remedy for claims in excess of $15,000. First, this remedy is available only to a limited class of plaintiffs, a point which respondents leave to be more fully developed in the companion cases. *See Leist v. Simplot, supra*, at 312-13. Second, even with respect to those persons for whom the "benefit" of reparations may be available, the remedy is apparently available only if the Commission, in its opinion, determines that the facts contained in the initial petition warrant any further investigation. CEA §14(a). Unless "there appear to be, in the opinion of the Commission, any reasonable grounds for investigating any complaint," CEA §14(b), the matter is apparently at a close, with the Commission's exercise of its discretion not subject to any sort of judicial review. (CEA §14(g), dealing with appeals, provides only for persons aggrieved by any "*order*" of the Commission, which is defined in CEA §14(e) and does not include a decision not to pro-

ceed with a complaint). This lack of judicial review is explainable only because Congress assumed that access to the federal courts would continue to be available, as it had been prior to 1974.[29] Third, the express language of CEA §14(a) states that an aggrieved individual "*may*" initiate a reparations proceeding, which certainly could be deemed to imply an option on the part of such individual to take his complaint elsewhere. For claims in excess of $15,000, any alternative forum could only be the federal district court. *Alken v. Lerner*, 485 F.Supp. 871 (D.C. N.Y. 1980). Finally, CEA §14(b) obviously contemplates that claims which do not exceed $5,000 may be handled through reparations. These procedures are informal and can be analogized to the settlement procedures provided elsewhere by the CEA, which are expressly made voluntary. CEA §§5a(11), 17(b)(10). Logically, the reparations remedy is similar to the other remedies expressly provided by the CEA. An aggrieved trader, therefore, should not be compelled to resort to the reparations procedure. BROMBERG & LOWENFELS, SECURITIES FRAUD & COMMODITIES FRAUD, §461 at 82.362 (1979); *Smith v. Groover*, 468 F.Supp. 105 (N.D. Ill. 1979); *Jones v. B.C. Christopher & Co.*, 466 F.Supp. 213 (D. Kan. 1979); *R. J. Herely & Son Co. v. Stotler & Co.*, 46 F.Supp. 345 (N.D. Ill. 1979).

Having thus disposed of petitioner's most forceful argument, a few scattered arguments remain which can be quickly answered. First, petitioner argues that the proviso in §2(a)(1) of the CEA, 7 U.S.C. §2, that "[n]othing in this section shall supersede or limit the jurisdiction conferred on courts of the United States or any State" (PB 30) does not indicate any Congressional intent to preserve the previously acknowledged private right of action. However, the Rodino-Clearwaters statements offered by petitioner to explain the quoted language are not limited to concern over the possible preemption of antitrust jurisdiction. (PB 31). Keith Clearwaters, Deputy Assistant Attorney General, testified before the Senate committee that the language of §201(B) of H.R. 13113, unless clarified by the above-quoted proviso, "could be interpreted to deprive the

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[29] *See* n. 19 *supra*.

Federal courts of their jurisdiction under the antitrust laws and to deprive Federal and State courts of jurisdiction to enforce contract and commercial law rights." *1974 Hearings* at 663. Depriving state courts of jurisdiction (or federal courts of diversity jurisdiction) could not have been the intended effect, since "no substantive provisions in the nature of contract or commercial law are included in the bill. Clearly, the Commission was not intended to adjudicate disputes between commodities brokers and their customers over contract terms or similar matters." *Id.* at 663-64 (statement of Mr. Clearwater). The Chairman of the committee, Sen. Talmadge, responded to Mr. Clearwaters as follows: "I doubt that this committee, and I doubt the House had in mind depriving either Federal courts or [*sic*] jurisdictions in antitrust matters, *or any other matter*, and certainly not State courts." *Id.* at 664 (emphasis added). Sen. Talmadge summarized the concerns of James Halverson as substantially the same as those of Mr. Clearwaters, *i.e.*, "to make clear that the courts can still operate." *Id.* at 668.

In addition to these statements, Senator Clark, while expressing a preference for a treble damages provision, noted that "[u]nfortunately, the House bill [H.R. 13113] not only does not authorize them, but Section 201 of that bill may prohibit all court actions. The staff of the House Agriculture Committee has said that this was done inadvertently and they hope it can be corrected in the Senate." *1974 Hearings* at 205. Professor Roy Schotland testified that, if the reparations proceedings were enacted "there should be explicit language in the statute that Federal and State courts are still open if a complainant prefers to go to trial there." *Id.* at 737, 746.

The purpose of the Senate amendment to §201, according to the Joint Explanatory Statement of the Conference Committee on H.R. 13113, was to make clear that federal and state courts would *retain their respective jurisdictions*. 120 CONG. REC. 33042 (1974). This explanation and the statements quoted above, coupled with Congress' knowledge of the existence of an implied right of action for violations of the CEA, lead to the inescapable conclusion that Congress *intended* for this private right of action to continue.

C. The 1978 Amendments to the CEA Provide Further Evidence of Congressional Intent to Create a Private Right of Action Under the CEA.

Petitioner also argues that the 1978 amendments to the CEA, by explicitly providing for *parens patriae* actions by state attorneys general on behalf of residents of their respective states, CEA §6d, negates any intention by Congress *implicitly* to provide for a right of action by private individuals. (PB 33). The legislative history of the 1978 amendments simply does not support petitioner's argument.

Much discussion of the need for §6d, authorizing *parens patriae* suits, can be gleaned from the legislative history of the 1978 amendments. The inescapable conclusion which is reached from an analysis of that legislative history is that *parens patriae* suits could have been instituted under prior law, but that states had been unwilling to invoke that doctrine absent explicit (rater than implicit) legislative authority. The CFTC itself repeatedly brought this problem to the attention of the legislators. *Hearings Before the Subcommittee on Conservation and Credit of the Committee on Agriculture, House of Representatives on H.R. 10285*, 95th Cong., 2d Sess. XI (1978) (summary of CFTC position) (hereinafter "*1978 House Hearings*"); *id.* at 36 (statement by William T. Bagley, CFTC Chairman, that "we have . . . urged the States to implement the doctrine of *parens patriae*"); *id.* at 63 (statement by John V. Rainbolt, II, CFTC Vice Chairman, that "States have been reluctant to use the *parens patriae* theory. In any case, it has *incorrectly* been stated by state securities commissioners that States are totally preempted. Accordingly, the Commission seeks to *clarify* these responsibilities by inserting within the Act express authorization for States to bring suit as *parens patriae* . . ."); *id.* at 81 (remarks of Mr. Rainbolt); *id.* at 91 (remarks of Mr. Bagley). The 1978 amendments were also needed to forestall certain restrictions which had been imposed by the common law *parens patriae* doctrine, such as the requirement that the State could intervene only to protect its quasi-sovereign interests. S. REP. NO. 95-850, *supra*, at 25.

Senator Leahy, in discussing the 1978 amendments to the CEA, explainted the *parens patriae* provision by expressly referring to the existence of private rights of action:

> The exemption from State suits provided to contract markets is justified due to the deterrent effect on contract markets caused by Commission regulation, institution of Commission enforcement proceedings, and the implied private rights of action that may be brought against those contract markets that fail to discharge their duties under the Commodity Exchange Act. In those actions brought by a State under this bill, a customer who makes an informed, voluntary election to have his State sue on his behalf to recover monetary damages for a particular violation would thereby extinguish that person's other alternatives for redress: arbitrations, reparations, *or judicially implied private rights of civil action under the Act*.

124 CONG. REC. 16527 (Sept. 28, 1978) (emphasis added).

Other aspects of the 1978 amendments further support respondents' view that an implied private right of action was intended to continue as part of the total legislative scheme. The reparations rules promulgated by the CFTC were described as having created "in effect, a 'small claims court' for persons who had suffered losses due to violations of the CFTC Act and regulations," *1978 House Hearings* at 17 (statement by CFTC Chairman Bagley), which is entirely inconsistent with petitioner's claim that reparations was intended by Congress to be the *exclusive* remedy for large damage claims. Further, Senator Huddleston, sponsor of the 1978 amendments, explained the reason for a modification of the reparations procedure in the following fashion:

> Compounding the undue stress placed on the reparation program, certain Federal district courts have taken the unfortunate position that Congress intended reparations to be the exclusive forum for adjudicating commodity customer claims. [citations omitted.] In order to alleviate the burden on the Commission's reparation program, the committee adopted an amendment that provides —

> for reparation complaint where the amount claimed as damages does not exceed $5,000 — that a hearing be held only on the novel or basic issues that are determinative of the case. Thus, an aggrieved commodity customer will be able to obtain more expenditious treatment of his claim should the customer elect to pursue a claim in reparations rather than to proceed to arbitration or pursue in court the private right of action which has been judicially implied for violations of certain provisions of the Commodity Exchange Act, or which in the future courts may recognize for other provisions of the act.

124 CONG. REC. 10537 (1978); *see also Alken v. Lerner, supra*.

Thus, contrary to petitioner's agruments before this Court, the 1978 amendments to the CEA and the corresponding legislative history are both supportive of the plainly expressed Congressional intent to permit the continuation of private rights of action on behalf of commodity futures traders who have been damaged by violations of the CEA.

Congressional intent to sanction the continuing implication of a private right of action for violations of the CEA has not been negated by any of the arguments offered by petitioner. On the contrary, Congress enacted the CFTCA with a knowledge that private rights of action had been judicially implied under the CEA and expressly preserved the jurisdiction of federal and state courts. The legislative history evinces a clear Congressional intent that private rights of action be continued and the 1974 and 1978 amendments can only be viewed as supplementing, rather than excluding, the previously existing private right of action. Any other interpretation of the CEA would ignore Congressional intent, thereby eroding, if not destroying, the principles set forth in this Court's decision in *Touche Ross, TAMA* and *Cannon, supra*.

III.

IMPLICATION OF A PRIVATE RIGHT OF ACTION IS ENTIRELY CONSISTENT WITH THE UNDERLYING PURPOSES OF THE LEGISLATIVE SCHEME

It is virtually self-evident that the underlying purpose of the CFTCA, *the protection of investors*, 120 CONG. REC. 9402, Point F. (1974) (remarks of Rep. Smith); 120 CONG. REC. 10737 (1974) (remarks of Rep. Poage that the legislation "sets up new customer protection features"); INTERIM REPORT, *supra; 1973 Hearings* at 11 (remarks of Rep. Smith), can best be served by the implication of a private right of action for violations of the CEA. *J. I. Case Co. v. Borak*, 377 U.S. 426 (1964). The CFTC, the regulatory agency in charge of the administration of the CEA, has itself urged that the continued availability of a private right of action is necessary to ensure enforcement of the CEA. *Leist v. Simplot, supra*, at 321, citing the *amicus brief* filed in that case by the CFTC. The position of the Currans in the instant case is even further justification for the implication of a private remedy, since otherwise there will be no remedy available to compensate them for petitioner's fraud. In a case such as this, it can hardly be argued that the implication of a private remedy is not necessary to effectuate Congressional intent. As further evidence of the appropriateness of an implied remedy, the 1978 amendments to the CEA were designed partially to alleviate the backlog of reparations proceedings, 124 CONG. REC. 10537 (1978) (remarks of Sen. Leahy), a backlog which is becoming increasingly more severe.[30] Despite this, the argument advanced by petitioner in the instant case would lead to a much higher volume of reparations cases, since it would foreclose any alternative federal remedy for aggrieved customers.

Nor can it be argued that the position advanced by petitioner would reduce the congestion in the judicial system. Even if it is held that no federal private right of action exists for violations of §4b of

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[30] *See* n. 24, *supra*.

the CEA, the federal courts would still be required to adjudicate commodity issues raised by state law claims on the basis of diversity jurisdiction. 28 U.S.C. §1332. Under such circumstances, the federal courts would have to apply applicable state law in order to resolve common law commodity claims, *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), which hardly comports with the Congressional intent that commodity law should develop exclusively in the federal courts. The federal courts were made the exclusive forum for all claims based upon violations of the CEA so that a coherent body of case law could evolve. SEN. REP. NO. 95-850, *supra*, at 25. In the absence of an implied federal cause of action, piecemeal litigation is likely to develop. Complaints that provisions of the CEA were violated could be theoretically handled through reparations, CEA §14(a), while state law claims (such as allegations that a broker breached a contract with his customer) would have to be handled through various state courts. Nor is it certain that an adverse decision in a reparations proceeding would necessarily preclude a customer from subsequently seeking relief in state courts on state law claims.[31] Only in federal courts, through the exercise of pendent jurisdiction, can all federal and state law claims related to a single transaction be raised in a single forum.

Against the obvious desirability of private lawsuits to effectuate Congressional intent and the consistent interpretations of the CFTC that reparations was designed merely to supplement private remedies, 41 Fed. Reg. 3994 (1976); 41 Fed. Reg. 18472 n. 5 (1976); 17 C.F.R. §12.21(a)(7) (1977); *Stucki v. American Options Corp.*, [1977-1980] COMM. FUT. L. REP. (CCH) ¶20,559 at 22,283 (CFTC 1978), petitioner argues that the allowance of a private remedy would somehow upset a delicate "balance" in the regulatory scheme. Respondents fail to accept petitioner's basic premise in this

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[31] Common law claims and agency claims which are cognizable by state law and which arise during the course of the broker-customer relationship are not specifically authorized to be brought before the CFTC in a reparations proceeding. It is arguable, therefore, that an adverse decision in a reparations proceeding may not be *res judicata* with regard to subsequent state court litigation.

regard, which is that litigation in the federal courts would be so much more onerous and burdensome to defendants than would a complete reparations proceeding, followed by an appeal to the federal courts. Petitioner cites to *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740-43 (1975) (PB 37) as evidence that federal litigation may be unduly onerous and disruptive, but the situation described in *Blue Chips* is not at all analogous to the case *sub judice*. The litigative burden enunciated in *Blue Chips* dealt with a defendant's potential liability if the purchaser-seller requirement of Rule 10b-5 was abrogated. In such a case, the class of potential plaintiffs would be unlimited. By contrast, a violation of §4b of the CEA can only create a cause of action against a broker *in favor of his customer*. The explicit language of §4b causes its provisions to be violated only if the broker's misconduct is directed towards *his own customer*. Thus, a requirement of privity can fairly be read into that statute, which is a far cry from the situation described in *Blue Chips*. Since a customer can, in any event, file a lawsuit against his broker alleging violations of contract and commercial claims under state law (Counts I, II, III, VII, VIII, and IX of the Currans' complaint in the instant case — JA 15-20), and since diversity of citizenship may result in a trial of these issues in federal court, 28 U.S.C. §1332, it is difficult to understand how the implication of a private cause of action under §4b of the CEA could have any deleterious effect upon the regulation of commodity futures trading.

IV.

THE REGULATION OF TRADING ON THE COMMODITY FUTURES MARKET IS NOT TRADITIONALLY RELEGATED TO STATE LAW

The federal government has been closely involved in the regulation of commodity futures trading since 1922, and §2(a)(1) of the CEA pre-empts the application of state law. *International Trading, Ltd. v. Bell*, 262 Ark. 244, 566 S.W. 2d 420 (1977); BROMBERG & LOWENFELS, *supra*, at §4.6. Even petitioner acknowledges that the "CEA manifestly makes regulation of commodity futures trading a

federal concern." (PB 39). No wonder, then, that petitioner refuses to address directly the fourth consideration set forth in *Cort*. Petitioner's arguments in this regard have been adequately addressed in Part II-B, *supra*. Suffice it to say that the fourth *Cort* factor makes it perfectly clear that it would not be inappropriate to imply a federal cause of action for violations of §4b of the CEA.

CONCLUSION

For the foregoing reasons, Respondents J.J. Curran and Jacquelyn L. Curran respectfully request that the Court affirm the Judgment of the Court of Appeals with respect to the continued existence of a private right of action under CEA Section 4b.

Respectfully submitted,

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